Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended By the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

NCTA – THE INTERNET & TELEVISION ASSOCIATION'S OPPOSITION TO THE MOTION FOR STAY OF THE NATIONAL LEAGUE OF CITIES, ET AL.

Rick C. Chessen
Neal M. Goldberg
Radhika Bhat
NCTA – The Internet &
Television Association
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001
(202) 222-2445

Howard J. Symons
Ian Heath Gershengorn
Jessica Ring Amunson
Michael E. Stewart
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for NCTA – The Internet & Television Association

October 15, 2019

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended By the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

NCTA – THE INTERNET & TELEVISION ASSOCIATION'S OPPOSITION TO THE MOTION FOR STAY OF THE NATIONAL LEAGUE OF CITIES, ET AL.

Pursuant to 47 C.F.R. § 1.45(d), NCTA – The Internet & Television Association ("NCTA") hereby opposes the request to stay the Commission's Third Report and Order implementing Section 621(a)(1) of the Cable Communications Policy Act of 1984 (hereinafter "*Third Report and Order*" or "Order") filed by the National League of Cities, the United States Conference of Mayors, the National Association of Regional Councils, the National Association of Towns and Townships, and the National Association of Telecommunications Officers and Advisors (collectively, "Movants").[1]

INTRODUCTION AND SUMMARY

The *Third Report and Order* became effective on September 26, 2019. Yet Movants waited until almost two weeks after the effective date of the Order – and more than two *months* after the adoption of the Order – to seek this stay. The whole purpose of a stay is to preserve the

[1] *See In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, 34 FCC Rcd 6844 (2019) ("*Third Report and Order*").

status quo pending appeal, but Movants now seek to *change* the status quo. Their delayed motion should be denied, and the Order should remain operative.

Movants fail on every front to demonstrate that a stay is warranted. *First*, Movants have not demonstrated that they are likely to succeed on the merits of a petition for review. To the contrary, the Commission already has considered and explained the deficiencies with each argument Movants raise in their stay request. The Commission's conclusions in the *Third Report and Order* follow from the plain text of the Cable Act,[2] and to the extent the statute is ambiguous, the *Third Report and Order* reflects the Commission's reasonable interpretation of the statutory language and adequately justifies each of the Commission's actions.

Second, Movants have not demonstrated that they will suffer irreparable harm absent a stay. As an initial matter, their complete failure to move for a stay in the ample time they had prior to the effective date of the Order or otherwise to act with any urgency to attempt to keep the Order from going into effect belies their claims that the Order will cause them any irreparable harm. But even if their delay alone were not dispositive, their irreparable harm arguments also fail on the merits. Though framed in a variety of ways, all of their arguments are simply about the monetary losses that they may incur absent a stay and that they would recoup if they prevail in their challenge to the Order. It is hornbook law that monetary losses that can later be recovered do not constitute irreparable harm and cannot justify a stay.

Movants recast their purported harms in terms of budgetary items they say could be impacted if they are no longer able to collect excess franchise fees, even speculating about possible cuts to emergency services or shuttering educational access services. But they offer no evidence to show that the Order will result in any change for such services, and there is none. Rather, as

[2] 47 U.S.C. § 541.

the Order makes clear, franchising authorities can choose to retain in-kind services, including any they deem "essential," without interruption by reducing (based on the fair market value of those services) the monetary payments they collect from cable operators to comply with the statutory five percent cap. The Order recognizes that local (and state) governments are in the best position to reallocate resources based on changes in one of their revenue streams. Making such budgetary decisions is a core function of state and local government, not an "irreparable harm" from regulation of the cable industry.

Third, Movants have failed to acknowledge that a stay of the Order actually would cause irreparable harm to NCTA's members and their cable customers in the form of unrecoverable monetary losses. Because state and local franchising authorities will claim that the Eleventh Amendment and the Cable Act generally bar suits for damages against them, ongoing overpayments of franchise fees above the statutory maximum during the period of the stay would arguably be unrecoverable by cable operators once the Order is upheld. In any event, coupled with their low likelihood of success on the merits, Movants' unsupported allegations of irreparable harm are insufficient to merit a stay.

Finally, Movants have failed to demonstrate that the public interest favors a stay. Movants confuse their own narrow interests for the "public interest," when in fact the Commission fully considered and took steps to safeguard the public interest in reaching its conclusions in the *Third Report and Order*.

Movants' request for a stay should therefore be denied.

ARGUMENT

The Commission evaluates a request to stay the effectiveness of an order under four criteria: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[3] Movants' request falls short on each of these factors.

I. Movants Have Not Made a Strong Showing of Likely Success on the Merits.

Movants' cursory arguments fall well short of making a "strong showing" that they are likely to succeed on the merits of a judicial challenge to the *Third Report and Order*. Despite failing to request a stay for over two months from the release of the final *Third Report and Order*, and only then seeking a stay two weeks *after* the Order became effective, Movants offer little support for their merits arguments, which are all fully addressed by the Order itself.

A. Movants Have Failed to Demonstrate that They Are Likely to Succeed in Showing that the Commission's Interpretations of the Cable Act Were Unreasonable.

The Commission's interpretations of the Cable Act in the *Third Report and Order* are subject to the two-step analysis laid out by the Supreme Court in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*[4] If the statute is unambiguous, the Commission must give effect to Congress's plainly expressed intent.[5] If, however, the statutory text is ambiguous, the analysis proceeds to the second step, where a court will evaluate only whether the Commission's

---

[3] *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Denying Motion for Stay, 33 FCC Rcd 11750, 11751 ¶ 6 (WTB 2018) ("*Small Cell Order Denying Stay*") (citing *Nken v. Holder*, 556 U.S. 416, 425-26 (2009); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

[4] 467 U.S. 837 (1984).

[5] *Id.* at 842-43.

interpretation is based on a "permissible construction of the statute."[6] The reviewing court must defer to the Commission's reasonable interpretations of ambiguous terms in the statute.[7]

The Order demonstrates that its interpretations of the franchise fee provisions of the Cable Act are supported by the plain text adopted by Congress.[8] And, where the statute presents any ambiguity, the Commission's interpretations were reasonable and more than adequately justified, leaving no grounds for a successful challenge.

1. The Commission's Interpretation of the Franchise Fees Provision Comports with the Plain Text of the Cable Act.

The Commission was not writing on a blank slate when it interpreted Section 622 in the *Third Report and Order*. In *Montgomery County v. FCC*,[9] the Sixth Circuit concluded that "the term 'franchise fee' [in Section 622(g)] *can include* noncash exactions,"[10] and it remanded to the agency to explain "whether, and to what extent, cable-related exactions are 'franchise fees' under the Communications Act."[11]

The *Third Report and Order* resolved those questions. It demonstrated that the plain text and structure of the Cable Act's definition of "franchise fee" unambiguously includes cable-related, in-kind exactions.[12] Section 622(g) defines "franchise fee" to include "*any* tax, fee, or

---

[6] *Id.* at 843.

[7] *See Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 223-24 (D.C. Cir. 2018); *see also Chevron*, 467 U.S. at 842-43.

[8] *See Third Report and Order*, 34 FCC Rcd at 6852-54 ¶¶ 14-17 ("[T]he statutory text is alone sufficient to support our conclusion . . . .").

[9] 863 F.3d 485 (6th Cir. 2017).

[10] *Id.* at 491.

[11] *Id.* at 492.

[12] *Third Report and Order*, 34 FCC Rcd at 6852-54 ¶¶ 14-17.

assessment *of any kind* imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber . . . solely because of their status as such,"[13] subject to five explicit exceptions.[14] Outside of these exceptions, the plain text of the statute contains no language limiting the definition of "franchise fee" to only *certain types* of nonmonetary exactions.[15] As the Sixth Circuit recognized, the text points in the opposite direction, stating in no uncertain terms that Congress's inclusion of "*any* tax, fee, or assessment *of any kind*"[16] requires that an interpretation of the statute "give those terms maximum breadth."[17] The Commission did so by including cable-related, in-kind contributions within the definition of franchise fees.

Movants fail to explain how the text could bear any other interpretation. Beyond quoting the statute, they make no argument about the meaning of the text at all.[18] At bottom, their stay request turns on the argument that the phrase "any tax, fee, or assessment of any kind" somehow *unambiguously* does not mean "*any* tax, fee, or assessment of *any kind*," but rather silently *excludes* some kinds of assessments, while explicitly exempting others, from this sweeping definition. Without any textual basis to exclude in-kind, cable-related exactions from the definition of franchise fees, Movants' challenge to the *Third Report and Order*'s inclusion of such fees as

[13] 47 U.S.C. § 542(g)(1) (emphasis added).

[14] *See id*. § 542(g)(2); *see also Third Report and Order*, 34 FCC Rcd at 6849-50, 6853 ¶¶ 11, 15.

[15] *Third Report and Order*, 34 FCC Rcd at 6852-53 ¶ 14.

[16] 47 U.S.C. § 542(g)(1) (emphasis added).

[17] *Montgomery Cty.*, 863 F.3d at 490.

[18] *See* Motion for Stay of The National League of Cities, The United States Conference of Mayors, The National Association of Regional Councils, The National Association of Towns and Townships, and The National Association of Telecommunications Officers and Advisors at 5, MB Docket No. 05-311 (Oct. 7, 2019) (hereinafter the "Motion").

"franchise fees" subject to the five percent cap has no reasonable likelihood of succeeding on the merits.

Movants appear to recognize the weakness of their textual argument when they suggest that "the legislative history of the Cable Act[,] . . . judicial precedent, FCC precedent," and "past practice" make the statute "unambiguous."[19] Resort to such interpretive measures effectively concedes that the plain text does *not* unambiguously support Movants' reading, and in any event is unwarranted where the plain text forecloses Movants' interpretation.[20]

Even if the statutory text were ambiguous, however, the Commission's conclusion that "franchise fees" include in-kind, cable-related exactions not explicitly exempted by the statute is supported by both the structure and legislative history of the Cable Act in addition to the plain text. As noted above, against its broad definition of franchise fees, the statute enumerates specific exemptions of items that are not to be counted as "franchise fees."[21] If Congress had intended to exempt other kinds of "tax[es], fee[s], or assessment[s]" from the definition of franchise fees, it would have included them among this list of enumerated exceptions. Thus, for example, it would make little sense to conclude that Congress intended to exclude *all* PEG costs to cable providers from the definition of "franchise fees" when it in fact exempted only a *subset* of PEG costs – "capital costs which are required by the franchise to be incurred" for PEG facilities.[22] And

[19] Motion at 5.

[20] *See, e.g.*, *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 599 (2011) ("Congress's authoritative statement is the statutory text, not the legislative history." (internal quotation marks omitted)); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012) ("[P]etitioners' purposive argument simply cannot overcome the force of the plain text.").

[21] *See* 47 U.S.C. § 542(g)(2).

[22] *Id*. § 542(g)(2)(C); *Third Report and Order*, 34 FCC Rcd at 6853-56 ¶¶ 16, 20.

Congress declined to create such an exemption even though it enacted the PEG and I-Net provisions at the same time it enacted the franchise fee provisions.[23]

2. The Mixed-Use Rule and Preemption of Inconsistent State and Local Regulations Are Fully Authorized by Congress in the Cable Act.

Movants also argue that the Commission lacks the authority to implement the mixed-use rule or to preempt state and local regulations inconsistent with the Commission's rules with respect to any operator. The Order fully disposes of these arguments.

Movants' challenge to the mixed-use rule is baseless. They merely assert that it is "unsupported by the Communications Act," with nothing more. Even if Movants had actually articulated an argument, however, it would be unavailing. Again, the Commission was not writing on a blank slate. The Sixth Circuit previously upheld the mixed-use rule as applied to new entrants,[24] but in *Montgomery County* vacated and remanded the Commission's extension of this rule to incumbents so that the Commission could better explain the statutory basis for this action.[25] The Commission provided this explanation in the *Third Report and Order*, finding that the lack of a statutory basis to treat facilities that provide some type of telecommunications service as "a facility of a common carrier" under Section 602(7)(C) applies to all cable operators that provide common carrier services, including both incumbents and new entrants.[26] The Commission also explained that the legislative history revealed Congress's intent to preclude local franchising

---

[23] *Third Report and Order*, 34 FCC Rcd at 6855-56 ¶ 20.

[24] *Montgomery Cty.*, 863 F.3d at 492-93.

[25] *Id.* at 493; *Third Report and Order*, 34 FCC Rcd at 6847-48 ¶ 5.

[26] *Third Report and Order*, 34 FCC Rcd at 6881 ¶ 70.

authorities from regulating the provision of telecommunications services by incumbent cable providers under Title VI.[27]

As to the Commission's preemption authority, Movants assert with little elaboration that "[n]othing in the Cable Act imposes any limit on the authority municipalities may have outside the Cable Act to regulate those services."[28] Movants argue that the Commission does not have the authority to preempt conflicting state and local regulations imposed under sources of authority other than the Title VI cable franchising scheme. But Section 622(g)(1) makes clear that Title VI's limits on franchise fees apply to any obligations "imposed by a franchising authority *or other governmental entity*."[29] Moreover, as the Order explains, and Movants ignore, Section 636(c) of the Cable Act provides, broadly and unambiguously, that "*any provision of law of any State, political subdivision, or agency thereof*, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter [*i.e.*, the Communications Act of 1934] shall be deemed to be preempted and superseded."[30] "Congress has made it 'unmistakably clear' [in Section 636(c)] that the Cable Act will preempt any inconsistent *state or local law*."[31] This express authority thus empowers the Commission to preempt *any* state and local laws regulating the operation and services of cable systems that are

[27] *Id.* at 6881-83 ¶ 71.

[28] Motion at 5.

[29] 47 U.S.C § 542(g)(1) (emphasis added).

[30] *Third Report and Order* ¶ 81; 47 U.S.C § 556(c) (emphasis added).

[31] *Liberty Cablevision Of Puerto Rico, Inc. v. Municipality Of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005) (emphasis added); *see also Third Report and Order* ¶ 82 n.331 (citing *Liberty Cablevision* for the proposition that the Commission "may . . . expressly bar states and localities from acting in a manner that is inconsistent with both the Act and the Commission's interpretations of the Act, so long as those interpretations are valid").

inconsistent with Title VI, regardless of whether state and local regulators purport to be using powers stemming from a source other than Title VI.[32] Movants' unsupported assertion to the contrary is wrong and has no reasonable likelihood of success on the merits.

Movants' invocation of the D.C. Circuit's recent decision in *Mozilla Corp. v. FCC* is likewise misplaced.[33] The court in *Mozilla* explicitly contrasted the Commission's "fail[ure] to ground" its broad express preemption of all state and local broadband regulations in a source of statutory authority over broadband with the Commission's "express and expansive authority" to regulate under Title VI.[34] Because the *Third Report and Order* expressly relied on the Commission's Title VI powers to preempt inconsistent state and local regulations, *Mozilla* fully *supports* the Commission's Order here.

Finally, Movants incorrectly assert that the *Third Report and Order* "contradicts" Section 625 of the Act. Section 625 addresses a particular circumstance that may arise during the term of a franchise, permitting a cable operator to obtain modification of franchise requirements if the operator can demonstrate that those requirements are commercially impracticable and the modification is appropriate because of that impracticability; or to modify service requirements in certain circumstances.[35] But nothing in Section 625's express terms or structure limits the Commission's preemption authority over agreements that violate the Act. Such modifications stem from the *illegality* of any affected terms in franchise agreements, not their "commercial[]

---

[32] *See Third Report and Order*, 34 FCC Rcd at 6889-90 ¶ 80.

[33] *See* Motion at 6 (citing *Mozilla v. FCC*, No. 18-1051, --- F.3d ---, 2019 WL 4777860 (D.C. Cir. Oct. 1, 2019)).

[34] *Mozilla*, 2019 WL 4777860, at *51 (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010)).

[35] 47 U.S.C. § 545(a).

impracticab[ility]." Indeed, Section 625 is inapplicable to modifications of "any requirement for services relating to public, educational, or governmental access,"[36] which is a significant area of franchising abuse addressed by the *Third Report and Order*. Section 625 also does not prohibit the Commission's encouragement of negotiations to bring this or other aspects of existing franchises into compliance with the Cable Act as interpreted in the *Third Report and Order*. Nor do Movants explain their assertion that the *Third Report and Order* "purports to rewrite Section 626" of the Act governing franchise renewals,[37] when it does nothing of the sort in either its express terms or in its effects.

B. Movants Have Failed to Demonstrate that They Are Likely to Succeed in Showing that the *Third Report and Order* Was Arbitrary and Capricious.

Movants' assertion that the Commission "failed to answer . . . several unanswered questions identified by the Sixth Circuit"[38] in *Montgomery County* is simply incorrect. The Sixth Circuit's remand required the Commission to address (1) the statutory basis for including in-kind, cable-related contributions as "franchise fees" and (2) the statutory basis for applying the mixed-use rule to incumbent cable operators.[39] The Commission addressed precisely those questions in the *Third Report and Order*.

To the extent the Movants contend that the *Third Report and Order*'s franchise fee regulation is arbitrary and capricious because it failed to address certain counterarguments raised by local franchising authorities, Movants both misunderstand the nature of arbitrary and capricious

[36] *Id.* § 545(e).

[37] Motion at 6.

[38] Motion at 7.

[39] *Montgomery Cty.*, 863 F.3d at 491-93; *Third Report and Order*, 34 FCC Rcd at 6846-48 ¶¶ 4-5.

review and are incorrect on the facts. When responding to comments, the Commission "is not required to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking."[40] It need only "state the main reasons for its decision and indicate[] it has considered the most important objections."[41] A rule is not arbitrary and capricious if the agency's response to public comments "enable[s a court] to see what major issues of policy were ventilated and why the agency reacted to them as it did."[42] The *Third Report and Order* easily clears this bar, responding to the major concerns raised by local franchising authorities and other interested parties on the record, and stating the reasons that the Commission rejected their proposed interpretations of the Cable Act.

Movants also fail to identify any substantial arguments that were not addressed by the Commission. Contrary to Movants' assertions, the Commission addressed at length and reasonably rejected local franchising authorities' argument that including cable-related, in-kind exactions as franchise fees created "statutory inconsistencies,"[43] and arguments related to the cost of PEG channels, I-Nets, and buildout obligations.[44] The Commission also directly addressed the argument that its rules could impact public safety,[45] giving local franchising authorities the choice

---

40 *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (alterations omitted)).

41 *Id.* (quoting *Simpson v. Young*, 854 F.2d 1429, 1435 (D.C. Cir. 1988)); *see Mozilla*, 2019 WL 4777860, at *50 (observing that the Commission is not "bound to review every document," is "fully capable of determining which documents are relevant to its decision-making," and "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

42 *Pub. Citizen, Inc.*, 988 F.2d at 197 (quoting *Auto. Parts*, 407 F.2d at 335 (alteration omitted)).

43 *See Third Report and Order*, 34 FCC Rcd at 6855-56 ¶ 20.

44 *Compare* Motion at 7 *with Third Report and Order*, 34 FCC Rcd at 6855-56, 6860-76 ¶¶ 20, 27-58.

45 *See, e.g.*, *Third Report and Order* ¶ 55, 34 FCC Rcd at 6874 n.221.

to retain any in-kind services they desire, including any they deem "essential" to public safety, without change or interruption. Such choices merely require appropriate adjustments to the monetary payments that the franchising authorities require from cable operators *in addition to* these in-kind services. Given these facts, the Commission properly concluded that these public safety concerns were overstated and, in any event, "cannot override the statutory framework."[46] The Commission further explained that, by statute, franchising authorities may impose regulations on non-cable facilities designed to protect public safety that are consistent with Title VI.[47] That Movants disagree with the Commission's reasoned rejection of franchising authorities' arguments does not mean the Commission did not consider and fully address them.

The Commission also provided ample justification for concluding that in-kind, cable-related exactions must be counted toward the franchise fee cap at fair market value, and for its conclusion that the Order will lead to greater investment in cable systems. Regarding the former, the *Third Report and Order* makes clear that the Commission considered the burdens of cost-shifting in connection with fair market valuation of exactions, and concluded that the fair market value measure better "adheres to Congressional intent."[48] Indeed, the Commission directly addressed Movants' argument related to line-itemization of certain in-kind costs on subscriber bills, concluding that Congress's directives regarding these itemizations do not speak to its intent as to which charges are excluded from the "franchise fee." That intent is found instead elsewhere

[46] *Id.* at 6873-75 ¶ 55; *see also id.* at 6872-73 ¶ 53 (noting that, under the *Third Report and Order*, franchising authorities are in control of the choice as to whether they retain certain in-kind contributions, including those that support public safety objectives, in lieu of higher monetary franchise fee payments).

[47] *Id.* at 6889, 6902 ¶¶ 79, 107.

[48] *Id.* at 6877 ¶ 61.

in the statute, where Congress broadly defined "franchise fees" with only limited exceptions.[49] The *Third Report and Order* was not arbitrary and capricious just because the Commission chose to address this question – which conclusively answered Movants' concern – once, rather than repeatedly throughout the Order.

Movants' other arguments – that the Order should have offered more support to show that it will "lead to more investment in cable systems" and should have addressed the effect of the requirement to pass franchise fee savings onto subscribers on deployment[50] – are likewise baseless. The Order properly considered the harms to broadband investment and deployment that the cable industry identified, as well as expert economic evidence quantifying such harms.[51] Movants make no attempt to explain how further consideration of these issues would have necessitated a change to the Order's conclusions, which reflect precisely the kind of predictive judgments and policy determinations that the FCC is in the best position to make.[52]

---

[49] *Id.* at 6857-58 ¶ 22 (citing 47 U.S.C. § 542(g)).

[50] Motion at 7-8.

[51] The Commission gave weight to a 2018 economic study (timely submitted by NCTA) and a 2019 economic study (timely submitted by Americans for Tax Reform) addressing these issues, while discounting older studies (submitted by local governments only two days prior to the start of the "sunshine period"). *See Third Report and Order*, 34 FCC Rcd at 6900 ¶ 104 & nn.386-88.

[52] As the D.C. Circuit recently affirmed, "[p]redictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies." *Mozilla*, 2019 WL 4777860 at *30 (internal quotation marks omitted) (citing *Pub. Citizen, Inc. v. Nat'l Hwy. Traffic Safety Admin.*, 374 F.3d, 1251, 1260-61 (D.C. Cir. 2004) and *Pub. Utils. Comm'n v. FERC*, 24 F.3d 275, 281 (D.C. Cir. 1994)). Movants accordingly have no reasonable chance of prevailing on the merits of their claim that the Commission erred by giving greater weight to the study submitted by NCTA. *See also id*. at *31 ("When intricacies of econometric modeling are in dispute, 'we do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority.'") (citing *City of Los Angeles v. U.S. Dep't of Transp.*, 165 F.3d 972, 978 (D.C. Cir. 1999)).

C. Movants Have Failed to Demonstrate that They Are Likely to Succeed in Showing that the Order Is Unconstitutional.

Movants also raise two constitutional challenges to the *Third Report and Order*, neither of which is likely to succeed on the merits.

First, Movants suggest that the Order "commandeers" state officers to administer a federal regulatory program by directing them to "surrender property and management rights" over rights-of-way. But Movants mistake preemption for commandeering. Commandeering describes attempts by Congress to directly command states or their officers to implement federal programs, such as by requiring state legislatures to pass laws[53] or refrain from doing so,[54] or to "command states officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[55] Movants do not identify any state legislative or executive officer who has been "put under the direct control of Congress" by the Cable Act or the *Third Report and Order*.[56] Instead, and unlike commandeering cases, the Cable Act's regulation of the cable industry is a valid exercise of Congress's enumerated powers, and its provisions merely prevent state or local governments (including franchising authorities) from imposing conditions *on cable operators* that are contrary to the Act's regulatory scheme. This is classic preemption: under the Supremacy Clause, state or local regulation must yield in the face of a contrary regulatory scheme.[57]

---

[53] *New York v. United States*, 505 U.S. 144, 175 (1992) (invalidating federal law requiring states to "take title" to certain radioactive waste or "regulat[e] according to the instructions of Congress.").

[54] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1470-71 (2018) (invalidating law prohibiting states from authorizing sports gambling).

[55] *Printz v. United States*, 521 U.S. 898 (1997) (invalidating federal statute requiring state and local officers to perform background checks on applicants for handgun licenses).

[56] *Murphy*, 138 S. Ct. at 1478.

[57] *Id.* at 1480.

Franchising authorities' ability to award franchises and assess franchise fees stems from the Cable Act;[58] when exercising a right granted by federal law, states cannot dictate the terms of the federal regulatory scheme – particularly terms that contravene that federal scheme – under the guise of avoiding "commandeering."

Movants also assert without elaboration that the *Third Report and Order* may violate the Fifth Amendment by "depriv[ing]" municipalities of "fair and reasonable compensation" for granting access to their rights-of-way.[59] Even assuming that placing limits on a franchising authority's ability to extract concessions from a cable operator as a condition for access to the rights-of-way could be considered a "taking,"[60] Movants' argument plainly fails because the Cable Act explicitly defines the "just compensation" that a franchising authority is entitled to, in the form of a franchise fee.[61] The *Third Report and Order* clarifies which items must be included within the franchise fee calculation in order to comport with the language of the Cable Act, but does not alter the fundamental structure of such compensation, which is fatal to Movants' claim.

Movants' argument that potential preemption of contracts that violate the Cable Act, as interpreted in the *Third Report and Order*, would constitute a "taking" is also without merit. Movants have no property interest in money that is extracted from cable operators and subscribers in violation of federal law.[62] Movants are similarly wrong that bringing franchise agreements into

---

[58] 47 U.S.C. §§ 541-542.

[59] Motion at 9.

[60] *But see Centel Cable Television Co. of Fla. v. Thomas J. White Dev. Corp.*, 902 F.2d 905, 909-10 (11th Cir. 1990) (citing *Centel Cable Television Co. of Fla. v. Admiral's Cove Assocs., Ltd.*, 835 F.2d 1359, 1363 n.7 (11th Cir. 1988)).

[61] *See* 47 U.S.C. § 542(b).

[62] *Cf. Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (explaining that the Fifth Amendment does not require compensation for all laws or programs that "adversely affect recognized economic values," such as uses of the taxing power and government actions not

compliance provides no public benefit. As the Commission explained, the *Third Report and Order* protects cable subscribers from excessive taxation and prevents localities from shifting the tax burden to the subset of their overall population that subscribes to cable.[63] The Order also benefits consumers through increased investment in broadband deployment,[64] and promotes competition among providers to secure lower prices and higher quality services for consumers.[65]

None of Movants' arguments are likely to succeed on the merits, and therefore a stay is not warranted.

II. Movants Would Not Suffer Irreparable Harm Absent a Stay.

While Movants' failure to demonstrate that they would likely succeed on the merits is sufficient reason on its own to deny a stay, they have also failed to demonstrate that they would suffer irreparable harm absent a stay. A showing of irreparable harm requires proof that the alleged harm "is both certain and great; actual and not theoretical."[66] Only "proof indicating that the harm is certain to occur in the near future" can warrant a stay.[67] Movants have failed to offer such proof.

"sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes").

[63] *See Third Report and Order*, 34 FCC Rcd at 6856-57 ¶ 21 (concurring with NCTA that "Congress intended franchising authorities to balance the desire for any in-kind exactions requested by parties in the renewal process against the overall franchise fee burdens on cable operators and subscribers"); *id.* at 6877 ¶ 61 (discussing concerns about "shift[ing] the true cost of an exaction from their taxpayer base at large to the smaller subset of taxpayers who are also cable subscribers").

[64] *Id.* at 6900 ¶ 104.

[65] *Id.* at 6887-88 ¶ 78.

[66] *In re Amendment of Parts 73 & 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, & Television Booster Stations & to Amend Rules for Digital Class A Television Stations*, Order, 26 FCC Rcd 11227, 11229 ¶ 9 (2011) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (alterations omitted)).

[67] *Id.* (quoting *Wis. Gas Co.*, 758 F.2d at 674).

A. Movants' Delay Demonstrates They Do Not Face Irreparable Harm.

First and foremost, it is critical to note that Movants did not seek a stay to prevent the *Third Report and Order* from going into effect. The Order is already effective. The whole purpose of a stay is to maintain the status quo pending appeal. Yet what Movants seek is to *change* the status quo and to reverse the effectiveness of the Order. This is impermissible.[68]

Movants' delay in waiting to file for a stay until after the effective date of the Order completely undercuts their argument that they need equitable relief to prevent irreparable harm from occurring once the Order takes effect.[69] Movants offer no reason for their delay. They have had access to the Commission's draft order since July 11, 2019,[70] and the final *Third Report and Order* was adopted over two months ago on August 1, 2019. The Order was published in the Federal Register on August 26, 2019, and it became effective on September 26, 2019, as Movants recognize.[71] Yet, despite being aware of the likely contents of the Order for nearly three months, and in possession of the Order for over two months, Movants waited until after the Order went into effect to file for temporary relief. They cannot now claim that interim equitable relief is urgently needed in the face of such delay.

---

[68] *See Nken v. Holder*, 556 U.S. 418, 429 (2009) ("A stay 'simply suspends judicial alteration of the status quo . . . .'") (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (alteration omitted)); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) ("Generally, [a stay] . . . seeks to maintain the status quo pending a final determination of the merits of this suit."); *Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1979) ("A stay does not reverse, annul, undo, or suspend what has already been done.").

[69] *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (A "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

[70] *See Draft Third Report and Order*, FCC-CIRC1908-08 (July 11, 2019), https://docs.fcc.gov/public/attachments/DOC-358439A1.pdf.

[71] *See* Motion at 1.

To the extent Movants now claim that the Order has led to and will lead to uncertain effects for new or renewed franchising agreements, or that the timeframe for implementing the Order represents a hardship,[72] that uncertainty is of Movants' own making, as well, by delaying their stay request until after the Order went into effect. If there is certainty to be gained now, it is the certainty of maintaining the status quo: that the *Third Report and Order* is in effect and should remain so. Given the delay, "it [would] be more appropriate to allow the case to be decided on the merits rather than change the positions of the parties at an interim stage in the proceeding."[73]

Nor can Movants credibly claim that franchising authorities currently negotiating agreements or renewals with cable operators could not have foreseen these developments. These issues have been under consideration by the Commission for over a decade. The *Third Report and Order* is, as its name suggests, the third in a series of rulemakings to reform cable franchising that commenced in 2005.[74] The Commission previously addressed the franchise fee and mixed-use components of the *Third Report and Order* in its Second Report and Order in this docket; the *Third Report and Order* resolves issues that the Sixth Circuit explicitly remanded to the Commission in 2017.[75] That the Commission followed through on the rules it has been evaluating for over a decade is not the emergency for local franchising authorities that Movants claim.[76]

---

[72] *See* Motion at 16-17.

[73] *In re Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, 26 FCC Rcd 16471, 16475 ¶ 12 (MB 2011).

[74] *See All. for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (upholding, over a decade ago, the first Section 621 Order).

[75] *See generally Montgomery Cty.*, 863 F.3d 485.

[76] *See Third Report and Order*, 34 FCC Rcd at 6878 ¶ 63 n.250 (rejecting as "unfounded" the argument that the Order's rulings could constitute an "unexpected surprise" given the Commission's ongoing consideration, in a proceeding over a decade old, of the lawfulness of excluding PEG and I-Net costs from the franchise fee cap); Reply Comments of NCTA – The Internet & Television Association at 34 n.114, MB Docket No. 05-311 (Dec. 14, 2018) ("NCTA

B. Movants' Claimed Losses Are Monetary and Not Irreparable.

Movants' delay alone is sufficient to defeat their claims of irreparable harm. But those claims also fail on their merits. Though framed in a variety of ways, the claimed harms largely boil down to the monetary losses they will incur from the Order's determination that additional in-kind exactions are "franchise fees" that count toward the five percent cap. Movants' argument thus runs headlong into the rule that monetary losses that can later be recovered generally do not constitute irreparable harm.[77] Their attempts to recast these monetary harms in terms of municipal services that might otherwise be funded by excess franchise fees does not alter the analysis. States and municipalities may (and do) allocate and reallocate resources from changing revenue streams on a regular basis. Movants offer no evidence that the Commission's cable regulations, rather than their own budgeting decisions, would be the cause of any hypothetical service reductions. And while many of these same Movants raised similar claims in 2007 while unsuccessfully seeking a stay of the *Second Report and Order*, the "irreparable harms" they alleged never materialized.[78]

Reply Comments") (observing that the Commission has been considering these same issues for over a decade in the Section 621 proceeding, and that "franchising authorities have known for years that the Commission's authority to implement the Cable Act includes clarification of matters related to the franchise fee cap"); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 159 (2007) (rejecting "unfair surprise" arguments because even a change in agency interpretation is "unlikely" to have that effect where the new interpretation is proposed through notice-and-comment rulemaking).

[77] *See, e.g.*, *Small Cell Order Denying Stay*, 33 FCC Rcd at 11756 ¶ 17; *Phyllis Schlafly Revocable Tr. v. Cori*, 924 F.3d 1004, 1009 (8th Cir. 2019) ("Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." (quotation marks omitted)); *NACM-New England, Inc. v. Nat'l Ass'n of Credit Mgmt., Inc.*, 927 F.3d 1, 5 (1st Cir. 2019) (stating that, as a general rule, "traditional economic damages can be remedied by compensatory awards, and thus do not rise to the level of being irreparable" (quotation marks omitted)).

[78] The Movants who filed in 2007 argued that cable operators "will seek to take immediate advantage of the new rules, which will result in the disruption of thousands of existing, free[ly] negotiated contracts." *See* National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Counties, U.S. Conference of Mayors, Alliance

Decisions about resource allocation are inherent when a party suffers monetary losses, and are akin to the types of "competitive harm" suffered by private businesses when they experience financial loss. Even those consequences that flow from economic harm, including "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay,"[79] are not irreparable harm. Just as "revenues and customers lost to competition which can be regained through competition are not irreparable,"[80] so too the resource-allocation harms alleged by Movants are not irreparable in this context. To the contrary, as the Order explains, they are wholly within Movants' power.[81] There is thus no basis to conclude that the revenue reductions Movants allege (if they occur at all) must translate into any interruption or reduction in essential services. And the parties' potential expenses for future litigation likewise are not irreparable harm.[82]

Movants claim they will be required to pay additional incremental costs to negotiate franchise agreements that comply with the Order, and that they may have to pay "administrative

---

for Community Media, and Alliance for Communications Democracy, Request for Stay, MB Docket No. 05-311, at iii, 9 (Dec. 10, 2007) (asserting that the Commission's 2007 rulings "would permit incumbent operators to renege on existing franchise agreement commitments," including "I-Net[s] required in an incumbent's agreement [that] permit[] police and fire departments to receive and exchange vital public safety information, and may act as landline backhaul connections for 800 MHz public safety networks"). Despite these same claims, and the absence of a stay in that instance, these alleged "irreparable harms" never occurred.

[79] *In re Rural Call Completion*, Third Report and Order and Order, 33 FCC Rcd 8400, 8418 ¶ 50 (2018) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d at 674).

[80] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection Between Local Exch. Carriers & Commercial Mobile Radio Serv. Providers*, Order, 11 FCC Rcd 20166, 20170 ¶ 10 (1996) (quoting *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir. 1985)).

[81] *See Third Report and Order*, 34 FCC Rcd at 6872-73 ¶ 53.

[82] *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

and legal costs" in connection with altering franchise agreements.[83] They also argue that the Order will require them to pay (or credit toward franchise fees) the costs of I-Nets, and to "fund" the municipality's infrastructure.[84] Each of their examples posits that, hypothetically, there could be I-Net disruptions if the municipalities choose not to offset related costs from franchise fees and instead opt to "bid for alternative sources."[85] But at bottom, each is simply a complaint that the municipalities may have to pay additional funds to obtain the same services or face a reduction in the additional cash payments that cable operators are required to make – a paradigmatic example of financial harm that is not irreparable.

With respect to PEG capacity, Movants also fail to address the possibility of using new technologies – in particular Internet and social media – to supplement or replace current PEG offerings at lower cost to municipalities, and without restricting the flow of information.[86] Indeed, because such Internet resources reach beyond cable subscribers and potentially to all residents of a municipality, such offerings may better comport with Movants' PEG-related goals.

C. Movants Have Not Demonstrated Their Claimed Losses Would Be Sufficiently Certain to Warrant a Stay.

In addition to failing to identify an irreparable harm, Movants have failed to demonstrate that the harm they predict is likely to occur in sufficiently concrete terms to warrant a stay. While Movants assert that certain effects will occur for various municipalities now that the Order is in

---

[83] Motion at 12-13.

[84] *Id.* at 14.

[85] *Id.* at 15.

[86] The Commission highlighted these other distribution methods in another recent order. *See Leased Commercial Access; Modernization of Media Regulation Initiative*, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 4934 ¶ 13 (2019) (finding that the abundant online distribution opportunities available today "have developed into a viable substitute" for carriage of certain content on cable systems).

effect, they do not offer any concrete proof that such effects are certain to occur, nor do they give the Commission sufficient basis to determine whether these harms will occur or whether they will be "great." Movants have therefore not met their burden to support a stay.

Movants offer examples of seven jurisdictions that they say will be irreparably harmed by the Order.[87] Beyond the bare assertion that these jurisdictions will suffer irreparable harm in one way or another, however, Movants do not offer any information to contextualize their claims or give the Commission a basis to evaluate them. Demonstrating a likelihood of irreparable harm requires far greater detail and proof. While Movants list actions that municipalities may have to take in the future, they provide "few if any facts [to] permit" the Commission to "evaluate the context in which these claims are made," such as information about the "size and scope" of Movants' municipal budgets, the nature of the increased costs they are likely to incur, the reasonable alternatives they could pursue, and the level of certainty that the effects they posit will occur.[88]

Movants' arguments that a stay of the *Third Report and Order* is necessary to protect public safety and welfare are wholly unsupported and were adequately addressed by the Commission. Movants are free to continue to require the sorts of in-kind contributions related to I-Nets or emergency services that they say are threatened, they simply must offset their value against the five-percent franchise fee cap.[89] They are also free to shift their own budgetary priorities to

---

[87] Motion at 12-19.

[88] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 77-78 (D.D.C. 2013), *aff'd*, 760 F.3d 18 (D.C. Cir. 2014).

[89] *See Third Report and Order* ¶ 53.

continue funding these services; they merely will no longer have franchise fees in excess of the statutory 5% cap as one source of revenue to do so.[90]

Movants' arguments also cannot be squared with NCTA's members' past experiences of successfully transitioning municipalities away from I-Nets to paid-for transmission services, with no loss in essential services reliant on such capacity, when new franchising agreements or state franchising laws no longer required the free I-Nets. In those instances, cable operators have worked closely with municipalities to ensure the success of these transitions. There is no reason to believe the same would not be true here, particularly given the 120-day period recognized by the Commission for negotiations, and Movants offer none.[91] Movants' generalized claims about the potential harm to public safety and government functionality due to implementation of the Order are belied by actual experiences cable operators and municipalities have had in terms of transitioning services from free to paid services. In 2018, for example, Charter's franchise renewal with Louisville, Kentucky eliminated the obligation to provide an I-Net at no cost to the city, and the parties worked cooperatively to transition the I-Net functionality to a paid service on fair and reasonable terms that ensured service remained in place without removing funding from other critical services.

Movants also overstate the supposed challenges presented by the 120-day period to transition with respect to maintaining I-Net services. Contrary to Movants' apparent misunderstanding, the 120-day period does not start from the effective date of the Order, but rather

[90] The Commission also mitigated potential issues that the Order might have posed to public health and safety by clarifying that its preemption authority does not extend to state and local authority "regarding matters of public health, safety, and welfare" that is otherwise consistent with Title VI. *Third Report and Order*, 34 FCC Rcd at 6889 ¶ 79 (citing 47 U.S.C. § 556(a)). The *Third Report and Order* thus leaves intact state and local authorities' ability to address any genuine safety issue that may arise in connection with non-cable facilities deployment in the rights-of-way.

[91] *Third Report and Order*, 34 FCC Rcd at 6878 ¶ 62 n.247.

from the date operators provide information to the franchising authority about its valuation of in-kind exactions.

D. The Order Will Not Have the Effects on Franchise Renewal Negotiations that Movants Suggest.

Movants' claims about the effects on ongoing or upcoming franchise renewal negotiations do not show irreparable harm. In support of their stay request, Movants cite to a recent Comcast filing in a franchise renewal proceeding in Minnesota that references the *Third Report and Order*.[92] Movants contend that, if the Order remains in effect there, it will lead to "chaos and unnecessary waste of resources," and that they will be irreparably harmed by any requirement to enter into new franchise agreements "based on the holdings of the [*Third Report and Order*] that may ultimately not withstand scrutiny."[93] In fact, the Minnesota proceeding exemplifies the very overreach by franchising authorities that the Order is intended to address, underscoring why it is in the public interest for the Order to remain in effect.

In the Minnesota renewal cited by Movants, the franchising authority issued a preliminary decision rejecting Comcast's franchise renewal proposal because it failed to conform to a "Model Ordinance" reflecting the franchising authority's unilateral dictates of purported community needs and interests.[94] These include that Comcast and its subscribers:

- Pay the maximum 5% monetary franchise fee;
- Pay an additional 3% PEG support fee (without requiring those funds to be used for capital assets);
- Provide seven PEG channels, including three in high definition ("HD");
- Provide approximately 40 fiber return lines for PEG programming;

---

[92] Motion at 12 (citing and attaching Comcast's brief (Exhibit A) in a renewal proceeding involving the Northern Dakota County Cable Communications Commission, which represents approximately 18,000 subscribers in seven Minnesota communities).

[93] *Id.* at ii, 12.

[94] *See id.*, Exhibit A at 22.

- Provide extensive I-Net support; and
- Provide complimentary cable service to more than 60 public and private buildings – including a golf course, ice arena, and water treatment plant – "at no cost to the City or [the franchising authority]."[95]

The Model Ordinance further dictates that Comcast "will not offset or reduce its payment of past, present, or future Franchise Fees . . . as a result of its obligation to provide" complimentary services, and that "[a]lthough the sum of Franchise Fees plus the [PEG] payments . . . may total more than 5 percent of Grantee's Gross Revenues . . . the additional commitments shall not be offset or otherwise credited in any way against any Franchise Fee payments."[96] The franchising authority also put on Comcast the burden of proving that it "would be *unable to continue in business or earn a fair rate of return* if cable rates increase to meet" these dictates.[97]

As the Commission well knows, the *Third Report and Order* was issued to end such abusive franchising authority demands, consistent with congressional intent to "protect[] cable operators against unfair denials of renewal where the operator's past performance and proposal for

---

[95] *See* NDC4 Model Ordinance at 22-29, Exs. A, C, E, https://www.townsquare.tv/sites/default/files/documents/Exhibit%20E%20-%20Attachment%201%20-Model_Cable_Television_Franchise_Ordinance_for_Comcast_of_Minnesota.pdf.

[96] *Id.* at 24, Ex. A-4. The Movants inaccurately assert that Comcast has taken the position that LFAs must "'offset against . . . franchise fees the full amount of PEG-related funds' pursuant to the [*Third Report and Order*]." Motion at 13-14. In fact, Comcast argued that "NDC4 must offset against Comcast's franchise fees the full amount of PEG-related funds *that are not used for long-term capital assets, but instead for salaries, administration, or other operational costs*." *Id.*, Ex. A at 8 (emphasis added). As the Commission has clearly stated, PEG operating support payments count toward the franchise fee cap, while only PEG capital costs are excluded. *See Third Report and Order*, 34 FCC Rcd at 6860 ¶ 28 n.125 ("In some cases, LFAs require a grant or other monetary contribution earmarked for PEG-related costs. . . . These monetary contributions are likewise subject to the five percent cap on franchise fees, unless otherwise excluded under section 622(g)(2).").

[97] NDC4 Resolution No. 12-12-2018, *Recommendation Regarding Preliminary Assessment that the Comcast Formal Proposal for Franchise Renewal Be Denied*, at A-2 (emphasis added) (attached as Exhibit A).

future performance meet the standards established by [Title VI]."[98] While Movants contend that they should remain free of these federal strictures during the appeal process, the Minnesota proceeding shows that the Order's continued effectiveness is essential to ensure that franchising authorities begin hewing their franchising practices to the limitations and protections Congress established in the Cable Act, and do not take steps to thwart its operation even after the Order is affirmed.

Movants also claim that they will suffer irreparable harm because "[i]n [the Minnesota] case, the cable operator is now arguing, based on the Order, that the correct standard for the PEG provisions of the renewal is 'adequate'" – and not whatever the LFA unilaterally decides is "reasonable" under Section 626(c)(1)(D).[99] But this is not a "new 'adequacy' standard" just announced in the *Third Report and Order*, as Movants wrongly suggest.[100] It is a *statutory* limit on PEG requirements in the Cable Act that the Commission has interpreted *for more than a decade* as meaning "satisfactory or sufficient."[101] Movants' claims about irreparable harm to the franchising process if the Order remains in effect ring hollow.

[98] 47 U.S.C. § 521(5).

[99] Motion at 12-13.

[100] *Id.* at 13.

[101] *See In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5152 ¶ 112 (2007), *petition for review denied sub nom. All. for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008); *see also id*. (affirming the Commission's "authority to interpret the term 'adequate' in Section 621(a)(4) for the purpose of providing guidance to franchising authorities and cable operators"); 47 U.S.C. § 541(a)(4)(B).

E. Movants Would Not Suffer Irreparable Harm to Constitutional Rights.

As discussed above, *supra* Part I.C, Movants have not made a strong showing that they are likely to succeed on the merits. Their constitutional claims therefore also do not suffice to show irreparable harm.

III. NCTA's Members May Be Harmed if a Stay Is Put in Effect.

Compared with the speculative, unsubstantiated harms they raise, Movants' arguments improperly discount the very real harms that a stay could impose on cable operators, including NCTA's members. Because the *Third Report and Order* is already in effect, Movants misstate the status quo, which would be preserved only by denying a stay. If a stay were now granted and the status quo changed, cable operators and their subscribers could be forced to continue incurring excess fees and in-kind obligations that violate the Cable Act, yet are likely unrecoverable. State entities could seek to claim immunity from suits to recover damages under the Eleventh Amendment,[102] and the Cable Act bars cable operators from seeking damages from state and local franchising authorities for claims "arising from the regulation of cable service."[103]

Movants are also incorrect when they argue that, because the Cable Act requires "any franchise fee reductions" to be directly passed through to subscribers, cable operators would not lose revenue if a stay is granted.[104] Just as before, franchising authorities may continue to impose franchise fees up to five percent of a cable operator's annual gross revenue from cable services, whether comprised of monetary payments, the fair market value of in-kind contributions, or some

[102] *See, e.g.*, *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994).

[103] *See* 47 U.S.C. § 555a; *Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm'n*, 923 F.3d 1163, 1169 (9th Cir. 2019); *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320, 324 (9th Cir. 1996).

[104] *See* Motion at 20 (citing 47 U.S.C. § 542(e)).

combination of both.[105] The regulatory relief provided under the *Third Report and Order*, however, goes to the *additional* fees, costs, and in-kind contributions that franchising authorities and other governmental entities have unlawfully imposed *on top of* the five percent cap, for both cable and non-cable services.[106] Cable operators have absorbed some of these unlawful additional costs and burdens without any direct pass through to subscribers, which, as shown above, reduces revenues, and diverts investment and impedes the deployment of cable and non-cable services that benefit consumers.

A stay would wrongly allow franchising authorities and other governmental entities to continue to collect such excess fees and other compensation in violation of the Cable Act, depriving cable operators of such revenues to the detriment of the public interest and with the prospects for recovery uncertain. The reduction in cable operator costs in excess of the franchise fee cap are not "franchise fee reductions" and their elimination therefore does not trigger Section 622(e). In any event, the benefit to consumers from not having to absorb additional fees imposed by franchising authorities additionally demonstrates that a stay is not in the public interest.

IV. A Stay Would Not Serve the Public Interest.

On top of the other deficiencies in their stay request, Movants' public interest arguments are woefully inadequate. They erroneously conflate their own interests in maximizing municipal budget revenues with the broader public interest identified in the *Third Report and Order*. In fact, the requested stay would harm the public interest, depriving cable subscribers of the protections

---

[105] 47 U.S.C. § 542(b).

[106] *See Third Report and Order*, 34 FCC Rcd 6872-73 ¶ 53 ("Under the interpretation adopted in this Order, cable operators will continue to provide support where an LFA chooses, but some aspects of that support will now be properly counted against the statutory five percent franchise fee cap, as Congress intended.").

of the franchise fee cap as well as price and service improvements that will result from the Order's regulatory cost savings. As the *Third Report and Order* recognizes, the public interest is best served by removing excess franchise fees and other costs that deter investment in broadband deployment and other innovative, next-generation services.[107]

Finally, while Movants make unsupported claims that a host of public safety operations, PEG programming, and local government budgetary decisions may be affected by the Order, *none* of these interests are directly regulated by the *Third Report and Order*. Instead, the Order, much like any administrative or judicial decision affecting public coffers, may, as a secondary effect, cause states and municipalities to rethink and reallocate budgetary priorities. But these secondary effects are squarely within states' and municipalities' control, as explained above and as the Commission explicitly recognized in the Order.[108] Although Movants seek to continue to place the burden of funding governmental services disproportionately on the backs of cable operators and subscribers, Congress intended to curb such practices under the Cable Act. The Order simply directs that Movants—and cable operators—conform their conduct to federal law, which likewise serves the public interest.[109]

---

[107] *See id.* ¶ 104 ("As the record reflects, even if cable operators were to continue to invest, such investments likely would be higher absent such requirements, and even small decreases in investment can have a substantial adverse impact on consumer welfare.") (citing, among other record evidence, NCTA Reply Comments App. 1, Report of Jonathan Orszag and Allan Shampine at 17).

[108] *Id*. at 6872-73 ¶ 53.

[109] *See id.* 6878 ¶ 63 ("It is strongly in the public interest to prevent the harms from existing franchise agreements to continue for years until those agreements expire."); *see also United States v. California*, 921 F.3d 865, 893 (9th Cir. 2019) (citing prior rulings that "it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available. . . . In such circumstances, the interest of preserving the Supremacy Clause is paramount").

As Movants themselves have stated, "it is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers."[110] The Commission gave effect to the plain text enacted by Congress, and Movants have failed to show their challenge is likely to succeed on the merits. The Commission should therefore deny a stay.

CONCLUSION

For the foregoing reasons, Movants' request to stay the effective date of the *Third Report and Order* should be denied.

Respectfully submitted,

Rick C. Chessen
Neal M. Goldberg
Radhika Bhat
NCTA – The Internet &
Television Association
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001
(202) 222-2445

/s/ Howard J. Symons
Howard J. Symons
Ian Heath Gershengorn
Jessica Ring Amunson
Michael E. Stewart
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for NCTA – The Internet & Television Association

October 15, 2019

[110] Motion at 22 (quoting *Sherley v. Sebelius*, 644 F.3d 388, 405 (D.C. Cir. 2011) (Henderson, J., dissenting)).

Exhibit A

NORTHERN DAKOTA COUNTY CABLE COMMUNICATIONS COMMISSION

RESOLUTION NO. 12-12-2018

RECOMMENDATION REGARDING PRELIMINARY ASSESSMENT THAT THE COMCAST FORMAL PROPOSAL FOR FRANCHISE RENEWAL BE DENIED

WHEREAS, the Northern Dakota County Cable Communications Commission ("Commission") is a joint powers commission organized pursuant to Minnesota Statutes §238.08 and §471.59, as amended, and includes the following seven (7) municipalities: Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul, Minnesota (the "Member Cities"); and

WHEREAS, the Commission was formed in 1982 and presently obtains its authority from the Member Cities under an Amended Joint Powers Cooperative Agreement ("JPA"); and

WHEREAS, on or about March 2000, the Member Cities enacted separate ordinances and entered into individual agreements authorizing MediaOne of St. Paul, Inc. to provide cable service (collectively, the "Franchises"); and

WHEREAS, the Commission has the authority under the JPA to administer the Franchises on behalf of the Member Cities, including negotiating and recommending renewal thereof; and

WHEREAS, as a result of several transfers of the Franchises, Comcast of St. Paul, Inc. ("Comcast") currently holds the Franchises in the Member Cities; and

WHEREAS, Section 626(a)(1) of the Cable Communications Policy Act of 1984, as amended (the "Cable Act"), 47 U.S.C. §546(a)(1), provides that if a written renewal request is submitted by a cable operator during the six (6) month period which begins with the thirty-sixth (36^{th}) month before franchise expiration and ends with the thirtieth (30) month prior to franchise expiration, a franchising authority shall, within six (6) months of the request, commence formal proceedings to identify the future cable-related community needs and interests and to review the performance of the cable operator under its franchise during the then current franchise term; and

WHEREAS, by letters dated July 27, 2012 and August 30, 2012, from Comcast to the Member Cities, Comcast invoked the formal renewal procedures set forth in Section 626 of the Cable Act, 47 U.S.C. §546; and

WHEREAS, the JPA empowers the Commission to conduct the Section 626 formal franchise renewal process on behalf of the Member Cities and to take such other steps and actions as are needed or required to carry out the formal franchise renewal process; and

WHEREAS, by letter dated August 7, 2012 the Commission, on behalf of the Member Cities, informed Comcast that the Commission had commenced proceedings to identify the future cable-related community needs and interests and to review the performance of Comcast under the Franchises; and

WHEREAS, in 2013 and 2014 the Commission conducted a detailed and comprehensive needs assessment process for the purpose of (A) identifying the future cable-related community needs and interests of the Commission and its Member Cities, and (B) reviewing the performance of Comcast under the Franchises, all as required by Section 626(a) of the Cable Act, 47 U.S.C. §546(a); and

WHEREAS, the Commission's needs ascertainment and past performance review produced the following reports: The Buske Group's "Community Needs Ascertainment - Northern Dakota County Cable Communications Commission (Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul, Minnesota)" and CBG Communications, Inc.'s "Report on the Institutional Network Technical Review and Needs Assessment for the Northern Dakota County Cable Communications Commission;" and

WHEREAS, since 2014 the Commission has been engaged with Comcast in informal franchise renewal negotiations contemplated by 47 USC § 546(h), in hopes of arriving at a renewed franchise; and

WHEREAS, in June of 2014, Comcast submitted FCC Form 394 requesting authority to transfer ownership of the cable system serving the Commission and Member Cities; however, the transfer request was terminated by Comcast in April 2015; and

WHEREAS, in February 2015 the Commission and Member Cities received a request for a competitive cable franchise from Quest Broadband Services, Inc. dba CenturyLink ("CenturyLink"); and

WHEREAS, the Commission processed CenturyLink's request for a franchise and in March 2016 each Member City granted a franchise to CenturyLink; and

WHEREAS, following the grant of the CenturyLink franchise the Commission and Comcast undertook further informal renewal discussions but were not able to reach agreement on a renewed franchise; and

WHEREAS, on February 7, 2018 the Commission directed staff to finalize preparation of formal renewal documents, as specified in Section 626(a)-(g) of the Cable Act, 47 U.S.C. §546(a)-(g); and

WHEREAS, based on the Commission's needs ascertainment and past performance review, best industry practices, national trends in franchising and technology, and its own experience, Commission staff prepared a Formal Needs Assessment Report ("Needs Report") which included a Request for Formal Renewal Proposal ("RFRP") and a Model Cable Television Franchise Ordinance ("Model Ordinance") that collectively address the Member Cities' present and future cable-related needs and interests, establish requirements for facilities, equipment and the channel capacity on Comcast's cable system and include model provisions for satisfying the identified cable-related needs and interests; and

WHEREAS, on April 4, 2018 the Commission approved the Needs Report, RFRP and Model Ordinance; and

WHEREAS, the Commission established July 16, 2018, as a deadline for Comcast's response to the Needs Report, RFRP and Model Ordinance; and

WHEREAS, even after the issuance of the Needs Report, RFRP and Model Ordinance, the Commission and Comcast engaged in informal renewal negotiations pursuant to 47 U.S.C. §546(h) but were unable to arrive at mutually acceptable terms, although informal discussions are ongoing; and

WHEREAS, on June 28, 2018 Comcast requested a thirty (30) day extension of the deadline for Comcast to provide its formal proposal; and

WHEREAS, on June 29, 2018 the Commission granted Comcast's extension request; and

WHEREAS, the new deadline for Comcast's response to the formal renewal request was set at August 15, 2018; and

WHEREAS, on or about August 15, 2018, Comcast submitted to the Commission its Formal Proposal in response to the Needs Report, RFRP and Model Ordinance ("Formal Proposal"); and

WHEREAS, on August 26, 2018, the Commission published a notice informing the public that Comcast's Formal Proposal had been received and was placed on file for public inspection in the Commission's office, as well as online, and that written public comments may be submitted to the Commission; and

WHEREAS, by letter dated November 28, 2018 the Commission and Comcast agreed that the Commission has the authority to issue a recommendation to the Member Cities regarding preliminary approval or denial of Comcast's Formal Proposal ("Letter of Understanding"); and

WHEREAS, under the Letter of Understanding, if the Commission recommendation is a preliminary denial, the Commission shall prepare a recommended resolution for consideration and action by each Member City; and

WHEREAS, under the Letter of Understanding, prior to March 15, 2019, each Member City shall consider and act upon the Commission recommendation at a regular or special City Council meeting; and

WHEREAS, pursuant to the Letter of Understanding, the Commission and Comcast further agree that if one (1) or more of the Member Cities issue a preliminary denial, the Commission shall administer any requested administrative proceeding as a group on behalf of one (1) or more of the Member Cities in accordance with 47 U.S.C. § 546(c); and

WHEREAS, the Commission has carefully reviewed Comcast's Formal Proposal and has determined a number of areas where the Formal Proposal fails to meet the future cable-related community needs and interests taking into account the cost of meeting such needs and interests, each of which is set forth in Exhibit A to this resolution; and

WHEREAS, should Comcast request the commencement of an administrative hearing pursuant to 47 U.S.C. §546(c), the Commission has prescribed Rules for the Conduct of an Administrative Hearing, attached hereto as Exhibit B, which rules comply with all procedural obligations set forth in 47 U.S.C. §546(c); and

WHEREAS, the Commission has carefully considered all public comment, including that contained within the Needs Report.

NOW, THEREFORE, BE IT RESOLVED BY THE NORTHERN DAKOTA COUNTY CABLE COMMUNUICATIONS COMMISSION, THAT:

1. Each of the above recitals is hereby incorporated as a finding of fact by the Commission.

2. Exhibits A and B are hereby incorporated by reference as if fully set forth in the body of this Resolution.

3. The Commission recommends that the Member Cities issue a preliminary assessment that the Comcast Formal Proposal should be denied and the Comcast Franchise should not be renewed.

4. The Commission preliminarily finds that Comcast's Formal Proposal fails to meet the Commission's and the Member Cities' future cable-related community needs and interests taking into account the cost of meeting such needs and interests.

5. The basis for the Commission's preliminary assessment is set forth in Exhibit A.

6. The Commission staff is directed to prepare a model resolution in form and substance substantially similar to this resolution for consideration by each of the Member Cities to confirm the Commission's preliminary assessment that Comcast's Formal Proposal fails to meet the Commission's and Member Cities' future cable-related community needs and interests taking into account the cost of meeting such needs and interests.

7. Should the Member Cities confirm the Commission's preliminary assessment, at any administrative hearing requested by Comcast, the Rules for the Conduct of an Administrative Hearing for one (1) or more of the Member Cities, attached hereto as Exhibit B will ensure that Comcast is afforded a fair opportunity for full participation including the right to introduce evidence, to require the production of evidence, and to question witnesses.

8. The Commission finds that its actions are appropriate and reasonable in light of the mandates contained in federal law including 47 U.S.C. §546.

PASSED AND ADOPTED this 12th day of December, 2018.

NORTHERN DAKOTA COUNTY CABLE COMMUNICATIONS COMMISSION

By: George Tourville
Its: Chair

ATTEST:

By: Jodie M. Miller
Its: Executive Director

EXHIBIT A

Analysis of Comcast's Proposal to the Northern Dakota County Cable Communications Commission

Lack of System Specific Financial Data

Comcast chose not to follow the directions of the RFRP which required that applicants provide financial information pertaining specifically to the Commission franchise area serving the Member Cities. Instead Comcast referred to Comcast Corporations' publicly available 10-K filings. In addition, Comcast submitted a one page income statement as well as a one-half page balance sheet (both labeled *Trade Secret*) prepared with data for the entire Comcast Twin Cities Region (Minnesota and Wisconsin). Comcast declined to provide any financial information specific to the Commission franchise area or for each Member City's franchise area, stating that such information was "confidential and proprietary" and "unnecessary."

Under 47 U.S.C. § 546(c) the Commission and Member Cities are required to consider whether Comcast's Formal Proposal is "reasonable to meet the future cable-related community needs and interests, <u>taking into account the cost of meeting such needs and interests</u>." Without financial information from Comcast that is specific to the cable system in the Commission franchise area, the Commission and Member Cities have limited ability to assess one of Comcast's primary objections to the Needs Report and Model Ordinance – that the cost associated with meeting the identified needs and interests render large portions of the Needs Report and Model Ordinance unreasonable.

Comcast's refusal to submit system specific financial data for the Commission franchise area is in direct violation of the requirements of the RFRP and eliminates the Commission's and Member Cities' ability to weigh the cost implications of the Needs Report and Model Ordinance against the Formal Proposal. Comcast appears to argue instead that the only consideration to be made by the Commission and Member Cities is whether the costs associated with the Needs Report will be "popular" among subscribers – a standard that Comcast appears to have created despite the requirements of 47 U.S.C. § 546. Comcast ignores the plain language of the Cable Act and the legislative history which provide that "in assessing the costs [under § 546(c)(1)(D)], the cable operator's ability <u>to earn a fair rate of return on its investment</u> and the impact of such costs on subscriber rates are important considerations." H.R. Rep. No. 98-934, at 74, reprinted in 1984 U.S.C.C.A.N. at 4711.

When a formal proposal does not satisfy an identified need, it is the franchising authority's obligation to decide whether the operator has established that the cost of meeting that need so outweighs the value of the need that the formal proposal is nonetheless reasonable. Without any specific financial information provided by Comcast to allow the Commission and Member Cities to determine if Comcast can earn a fair rate of return, the Commission and Member Cities are left with only Comcast's opinion that pass-through costs associated with meeting the Needs Report and Model Ordinance would not be well received by subscribers.

The House Report regarding 47 U.S.C. § 546 states:

It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.

H.R. Rep. No. 98-934, at 24, reprinted in 1984 U.S.C.C.A.N. at 4661.

As the House Report makes clear, the Commission and Member Cities are in the best position to understand the needs of the community and those needs and interests have been set forth in writing by the Commission when it adopted the Needs Report and Model Ordinance. Comcast appears to argue that the Commission and Member Cities should not focus on whether the Formal Proposal meets the Needs Report considering the cost implications to Comcast, but rather the Commission and Member Cities should consider whether the Needs Report and Model Ordinance may result in a rate increase to subscribers. Comcast relies upon its Comcast Survey to create its own alternative needs ascertainment and argues that if the Needs Report results in any rate increase, no matter what the amount, subscribers would be upset and therefore the costs associated with the Needs Report must be unreasonable.

Nowhere does Comcast present any evidence that Comcast would be unable to continue in business or earn a fair rate of return if cable rates increase to meet the Needs Report and the requirements of the Model Ordinance. Comcast offers no evidence that subscribers would disconnect from the cable system if the Needs Report were met. In fact, over the past 30 years that Comcast has held a franchise in the Commission franchise area, Comcast has routinely increased rates virtually every year to recoup programming cost increases, capital expenditures, employee expenses and other expenses. These rate increases may have been unpopular with subscribers, yet Comcast still implemented the increases and presumably remains a profitable company in the franchise area. Moreover, Comcast has recently entered into cable franchise agreements in the Twin Cities metropolitan area which contain similar or higher fee assessments and more burdensome franchise obligations[1] than those set forth in the Model Ordinance, yet Comcast remains profitable and thriving in those franchise areas based upon the financial information relied upon by Comcast in its Formal Proposal.

Comcast's Alternative Needs Assessment

Despite the fact that 47 U.S.C. § 546(a) requires that the Commission and Member Cities, not Comcast, identify the future cable-related needs and interests, Comcast chose to create its own ascertainment of future needs by submitting as part of its Formal Proposal an alternative Ascertainment Issues Survey dated September 2015 ("Comcast Survey"). Comcast presented its alternative needs and interests throughout the Formal Proposal.

Because 47 U.S.C. § 546(a) requires that the Commission and Member Cities identify the future needs and interests, Comcast's alternative ascertainment is of no value when determining if the Comcast Franchise meets the identified needs and interests contained in the Needs Report and Model Ordinance. To do otherwise would be to create a new ascertainment, one created by Comcast, which would then require a new opportunity to submit a formal proposal. The process

1 *See one recent example* - North Suburban Communications Commission ("NSCC") Cable Television Franchise Ordinance with Comcast which became effective in the fall of 2017 (depending upon the date of adoption of the NSCC member cities).

would be forever circular if the Needs Report and Model Ordinance created by the Commission and Member Cities are not maintained in final form, exactly as those documents were approved by the Commission, so that Comcast's Formal Proposal can then be weighed against the needs assessment as contemplated by 47 U.S.C. § 546.

By rejecting large portions of the Needs Report and replacing its findings with Comcast's alternative ascertainment, Comcast has ignored the express requirements of 47 U.S.C. § 546(b). The responsibility to assess future cable-related needs and interests in the franchise area rests with the Commission and Member Cities. Comcast is entitled to demonstrate in its Formal Proposal that Comcast's cost of meeting those identified needs and interests renders such needs and interests unreasonable. However, Comcast is not entitled to exercise legislative authority and determine on behalf of the Commission and Member Cities what those needs and interests may be. Nor is Comcast entitled to submit a formal proposal based on an ascertainment that has not been adopted by the franchising authority – the Commission and Member Cities. Comcast's approach in this renewal turns the federally mandated formal renewal process on its head and is in direct violation of the statutory requirements contained therein.

Comcast refusal to respond to Model Ordinance

Within the Formal Proposal, Comcast completely ignored the Model Ordinance and instead drafted and submitted an entirely different model franchise document which Comcast included as Exhibit 1 of the Formal Proposal - City of [X], Minnesota Ordinance Granting a Cable Television Franchise to Comcast of St. Paul, Inc. ("Comcast Model Franchise"). Comcast argues that the Comcast Model Franchise meets the Comcast Survey, with little regard for the finding of the Needs Report and the requirements of the Model Ordinance as prescribed by 47 U.S.C. § 546(a).

The Commission's Model Ordinance is substantially based on the existing franchise currently held by Comcast as well as the terms and requirements of the April 2016 Cable Television Franchise Ordinance granted by the Commission and the Member Cities to CenturyLink. Under Minn. Stat. § 238.08 the Commission and Member Cities are required to maintain a level playing field on several key franchise issues including the payment of franchise fees, public, education and government access requirements and the franchise area served. By ignoring the Model Ordinance and instead proposing the Comcast Model Franchise, Comcast places the Commission and Member Cities in the position of being unable to comply with Minn. Stat. § 238.08.

Comcast's Formal Proposal is unacceptable

Due to the volume of unacceptable provisions in the Formal Proposal, this Exhibit A will assess the differences between the Comcast Model Franchise on the one hand and the Needs Report and Model Ordinance on the other, to organize and present a list of reasons why Comcast's Formal Proposal is unacceptable and should be preliminarily denied. The below list outlines those portions of the Formal Proposal that are unacceptable as they do not meet the future cable-related community needs and interests set forth in the Needs Report and Model Ordinance, taking into account the costs associated with meeting those needs and interests. Since Comcast has substantially ignored the Model Ordinance and provided an entirely different Comcast Model Franchise, it is not possible to provide a section by section comparison as the documents are structured differently. The below section references are to the Model Ordinance prepared by the Commission and Member Cities.

Section 1.2 – Definitions

"**Gross Revenues**" – Within the Comcast Model Franchise, Comcast has proposed material changes to the definition of "Gross Revenues" upon which Comcast's franchise fee payments are based. In fact, Comcast presents an entirely different definition from that contained in the Model Ordinance. The Needs Report requires that Comcast remit franchise fee payments on any and all revenue derived from the provision of cable services in the franchise area. Comcast's attempt to limit the gross amount on which the calculation is based is unacceptable.

Comcast proposes that "gross revenues" be calculated in accordance with Generally Accepted Accounting Principles ("GAAP"). GAAP are standards for maintaining a company's books and records. GAAP does not direct how to calculate cable service revenue, particularly gross revenues specifically defined in a contract (franchise). Comcast's Formal Proposal could allow items that should be counted as gross revenues to go uncounted and could further allow for deductions for bundled services (cable, telephone and broadband) in excess of the definition included in the Model Ordinance. Nothing in the Cable Act references GAAP, and it is inappropriate to use these principles to allow for the potential unilateral determination by Comcast of what is (or is not) to be counted as gross revenues. For the reasons set forth above, Comcast's proposed definition of Gross Revenues is unacceptable.

"**Right-of-Way**" – Comcast does not define the term Right-of-Way, rather Comcast uses the term "Street" in its Comcast Model Franchise. The definition of Right-of-Way is contained in the existing Franchise and is carefully drafted to mirror definitions used by a number of the Member Cities in local city codes. Moreover, the Comcast definition for Street included in the Comcast Model Franchise contains a grant of authority to "entitle the Grantee to the use" of the Streets to install poles, wires and related facilities with no clarification how such a grant of authority would be administered by each Member City. For these reasons Comcast's proposal to use an overly broad definition for the term "Street" is not acceptable.

"**Subscriber**" – Comcast has made material changes to the definition of "Subscriber," which could have the impact of significantly altering the manner in which PEG fees are collected. By deleting the phrase, "[i]n the case of multiple office buildings or multiple dwelling units, the "Subscriber" means each lessee, tenant or occupant, not the building owner," Comcast is, in part, seeking to reduce the PEG fees to be paid and disproportionately assess PEG fees over its subscriber base. This is particularly true since Comcast is proposing a monthly PEG fee of $1.39 per subscriber.

By way of example, if such a PEG fee were to be implemented, each subscriber would remit such a fee as part of its monthly payment. But a 100 unit apartment building, with 80 cable Subscribers, may only have to remit one $1.39 PEG fee (instead of 80 x $1.39) because, under the Comcast Model Franchise, the landlord would be the only person (Subscriber) with a contractual relationship with Comcast, not each apartment lessee. Taking into consideration the number of multiple dwelling units ("MDU") in the Commission franchise area and the 10 year term contemplated by the Model Ordinance, the revenue that may be lost by the Commission and Member Cities due to this change would be significant.

In addition, for other purposes under the Model Ordinance, those living in MDUs may not be considered a "Subscriber" meaning they would have limited ability to exercise rights under customer service standards or related provisions of the Model Ordinance. Only the landlord would be considered the "Subscriber" under the Comcast Model Franchise.

For these reasons, Comcast's proposal to limit the definition of the term "Subscriber" is unacceptable.

Section 2 – Grant of Franchise.

Section 2.2 – Grant of Nonexclusive Authority. Comcast added Section 17.16 in its Comcast Model Franchise titled "Competitive Equity." Such a provision is not included in the Model Ordinance as this issue has long been addressed under Minn. Stat. § 238.08. Comcast's one-sided competitive equity mandate serves as a type of "most favored nations" provision that would allow Comcast to unilaterally walk away from franchise obligations if Comcast determines that another franchise has been granted with different material terms. In the alternative, Comcast seeks the option to abandon the cable franchise and opt into a competitor's franchise issued by a Member City.

Certainly every business would prefer to enter a contract where it is guaranteed the best possible terms and rates for a 10 year period and can unilaterally opt into a competitor's contract whenever it chooses. Comcast desires a franchise which grants to Comcast the authority to run cable and facilities down every street, sidewalk, road and alley. Comcast further desires the security of a long term franchise (10 years) but wants the ability to abandon the franchise with no consequences. Comcast offers the Member Cities no such option for unilateral termination if Comcast enters into a more favorable franchise elsewhere in the country. Unless such a provision works to the benefit of both parties, there is no rationale in contract law and no city would agree to such a one sided provision that can only work to the city's disadvantage.

Neither state nor federal law contains any similar competitive equity provisions other than the previously referenced Minn. Stat. 238.08, which is significantly limited in scope. The Model Ordinance presented by the Commission and Member Cities includes the Minn. Stat. 238.08 mandate. Comcast's competitive equity proposal seeks to provide Comcast with the maximum flexibility while conversely tying the Commission's and Member Cities' hands in negotiations with future competitive cable operators seeking franchises. For these reasons Comcast's competitive equity proposal is unacceptable.

Section 2.6 – Compliance with Applicable Laws and City Code. Comcast has proposed to delete entire sections of the Model Ordinance that would provide the Member Cities the option to amend their respective City Codes and have such code provisions govern over the terms of a franchise granted to Comcast. For this reason Comcast's proposal is unacceptable.

Section 2.8 – Territorial Area Involved. The Model Ordinance requires that in the event of annexation Comcast must serve the annexed territory so long as certain density criteria are met. Comcast's Model Franchise instead includes a provision that would allow Comcast to refuse to serve an annexed area if a competing cable operator is already providing cable service in that area. Such a provision would mean that rather than receive the benefits of competition in the annexed area, those homes in the annexed area would risk being served by one cable operator and lose the benefits of competition. For this reason Comcast's proposal is unacceptable.

Section 4.10 – Home Wiring. The Model Ordinance contains a requirement that serves to protect residential customers and ensure consumer choice for all providers of cable service in the franchise area. Specifically the provision requires Comcast to provide its subscribers with a notification upon commencement of service, and annually thereafter, advising them of their rights relating to home wiring as expressed by the FCC. The Comcast Model Franchise is completely silent on this provision and offers no alternative for consideration. For this reason Comcast's proposal is unacceptable.

Section 5.3 (e) and (f) – reports. These provisions of the Model Ordinance require Comcast to provide: 1) a quarterly customer service compliance report demonstrating Comcast's compliance with the customer service requirements contained in the franchise; and 2) a monthly subscriber data report consistent with the information Comcast has historically provided over the prior franchise term. Comcast's proposal requires that the Commission and Member Cities "request" reports after a showing of "demonstrated need." Not receiving these reports would prevent the Commission from undertaking the monthly due diligence it has historically performed on behalf of the Member Cities and would significantly limit the ability of the Commission to monitor Comcast's compliance with customer service and financial terms of the franchise. For this reason Comcast's proposal is unacceptable.

Section 6.2 – Subscriber Network Drops to Designated Buildings. The differences between the Model Ordinance and the Comcast Model Franchise are significant in this section. The differences relate to the type of service to be provided, the number of receivers (terminal equipment) to be provided and the number of locations to be served and many other details. For these reasons the Comcast proposal is unacceptable.

Section 7 – Institutional Network. As the Needs Report makes clear, the Institutional Network is an important issue to the Commission and Member Cities. The background regarding how the Institutional Network was financed, constructed, and utilized over the past 15+ year franchise term is set forth in the Needs Report. Section 7 of the Model Ordinance parallels much of the language contained in the existing Franchise between Comcast and Member Cities regarding the Institutional Network. The Commission updated the language to reflect that the Institutional Network is no longer a new construction project, but rather ongoing maintenance of an already existing network, one that was paid for by the institutional users of the network, not Comcast. Rather than provide any response to the Institutional Network or any alternative for consideration, Comcast's Formal Proposal and the Comcast Model Franchise are completely silent regarding the Institutional Network. In fact, there is literally no reference to the term "Institutional Network," nor any Institutional Network services, found anywhere in Comcast's Formal Proposal or Comcast's Model Franchise. As a result there is no ability for the Commission to provide a detailed analysis of any proposed differences between the Needs Report, Model Ordinance and Comcast's Formal Proposal. Comcast's failure to provide any proposal regarding an Institutional Network is unacceptable.

<u>Section 9.1 – Performance Bond</u>. The Comcast Formal Proposal includes a $100,000 joint performance bond, which is consistent with the Needs Report and the Model Ordinance. However, the Comcast Model Franchise fails to include any procedure under which the Commission or Member Cities can draw on the performance bond. A detailed procedure was included in the Comcast Model Franchise for the Commission or Member Cities to draw on the letter of credit, but no similar process was provided for the performance bond. Consistent with the existing franchise between Comcast and the Member Cities, as well as the requirements set forth in the Model Ordinance, an agreed upon process must be included within the franchise to provide clarification that either the Commission or Member Cities can draw upon the performance bond and the steps which must be undertaken to accomplish such a draw. For these reasons this proposal by Comcast is unacceptable.

<u>Section 9.2(b) – Liquidated Damages</u>. The Needs Report and Model Ordinance have maintained the level of liquidated damages consistent with the amounts contained in the existing Franchise between Comcast and the Member Cities. The amounts of liquidated damages in the Model Ordinance also parallel the liquidated damage levels contained in the CenturyLink franchise. Comcast's Formal Proposal and Model Franchise substantially reduce the amount of each category of liquidated damages. Moreover, Comcast proposes to cap the liquidated damages at 120 days, a provision which is not included in the Model Ordinance nor has ever been included in past franchises between the parties. For these reasons this proposal by Comcast is unacceptable.

<u>Exhibit A – PEG Access</u>. Comcast's Formal Proposal and Comcast's Model Franchise fail in many respects to meet the cable-related needs and interests of the Commission and Member Cities regarding public, education and government ("PEG") access. Below is a list of unacceptable deficiencies in Comcast's Formal Proposal and Comcast's Model Franchise, as compared to the identified needs and interests contained in the Needs Report and Model Ordinance.

1. **Number of PEG channels**. The Commission and Member Cities require seven (7) channels exclusively for PEG use. Comcast proposes to make available three (3) PEG access channels. Comcast offers no evidence of cost, impact on Comcast's business model in the Commission franchise area, or ability to earn a fair rate of return in the Commission franchise area. Comcast simply offers that the Commission and member Cities do not need the current number of PEG channels based on Comcast's assessment of the needs, not based on the Needs Report.

2. **PEG channel technical quality.** Comcast fails to provide contractual commitments to maintain adequate PEG technical quality to meet the standards set forth in the Needs Report and Model Ordinance. Comcast proposes instead to meet a vague technical quality standard that provides no point of comparison upon which to measure whether the PEG technical quality is consistent with those of other commercial programmers, including local television broadcast stations carried on the cable system.

3. **PEG channels in HD**. Within the Needs Report and the Model Ordinance the Commission and Member Cities require that a minimum of three (3) PEG channels be provided in high definition ("HD") technology while also maintaining standard definition

("SD") channels. Through this technology transition, the Commission and Member Cities would reduce one SD PEG channel and would, at the end of the technology transition, receive a total of three (3) SD/HD simulcast channels, and three (3) additional SD channels available for PEG programming. Comcast proposes in its Comcast Model Franchise to make available two (2) SD/HD simulcast channels and one (1) additional SD channel for PEG programming.

4. **PEG HD end user equipment.** Comcast proposes a requirement that any costs of end user equipment associated with the delivery of SD PEG channels in HD format would be borne by the Commission and Member Cities and must be paid for out of PEG funds. This is not a provision contained within the Needs Report or the Model Ordinance.

5. **PEG channel locations.** The Model Ordinance requires that if the PEG channels are relocated to a different location by Comcast, the PEG channels will be located in reasonable proximity to other broadcast channels. Comcast proposes that upon any relocation the PEG channels will be located in reasonable proximity to any other commercial video channels. The result of this proposal means that the PEG channels could be moved to an entirely different channel neighborhood, nowhere near local broadcast channels. Such a result would be inconsistent with the Needs Report and Model Ordinance. Such relocation would have a significant adverse impact on subscriber's ability to locate and view PEG programming and is inconsistent with the Needs Report.

6. **Promotion of PEG access channels**. The Commission and Member Cities have a need for 30 second promotional spots inserted in unsold ad avail timeslots on the cable system consistent with Comcast's past practices under its existing Franchise. The Comcast proposal is silent on this issue.

7. **PEG financial support.** The Needs Report and Model Ordinance outlined a demonstrated need for a PEG fee in the amount of three percent (3%) of Comcast's gross revenues to support PEG programming consistent with applicable law. Comcast's proposal provides for a monthly PEG fee of $1.39 per subscriber. The difference between these proposals is substantial. Comcast's proposal represents less than 50% of the demonstrated need set forth in the Needs Report and Model Ordinance. Comcast does not rely upon the Needs Report prepared by the Commission and the Member Cities, but rather upon its own alternative ascertainment – the Comcast September 2015 Ascertainment Issues Survey dated ("Comcast Survey").

   Moreover, Comcast fails to mention that within the Twin Cities market, Comcast recently agreed to renew a cable franchise with a similarly situated cable commission and in that franchise Comcast agreed to remit a PEG fee in the amount of three percent (3%) of gross revenues.[2] Comcast has not argued in its Formal Proposal that the PEG fee remitted in that other franchise area is unreasonable based upon the associated cost. Presumably Comcast still manages to maintain a viable business model and generate a return on

2 *See* Section 6.8 of the North Suburban Communication Commission Cable Television Franchise Ordinance. The 3% PEG fee commenced January of 2018.

investment in this recently renewed franchise area despite the financial support provide for PEG. Within its Formal Proposal Comcast references its recent SEC 10-K filings to support its strong financial position and strength as a leader in the cable communications industry. Because Comcast refused to provide system specific financial data as requested in the RFRP, the Commission and Member Cities are unable to assess the financial impact of the identified needs and interests, including the 3% PEG fee, on Comcast's cable system serving the Commission franchise area.

8. **PEG technical support.** The Model Ordinance outlines a number of existing technical provisions that Comcast currently provides under its existing Franchises with the Member Cities. The Commission and Member Cities have sought to maintain these commitments going forward and have outlined such technical provisions in its Needs Report and Model Ordinance. Comcast's Formal Proposal is largely silent on these technical support obligations or, in the alternative; Comcast substantially changes the manner in which these historical commitments will be maintained going forward.

9. **Video-on-demand.** The Commission and Member Cities have included a commitment to continue the existing video-on-demand services made available for PEG programming by Comcast in the Commission franchise area. Comcast's Formal Proposal and Model Franchise are completely silent on the provision of any PEG video-on-demand.

10. **Interconnection.** The Commission and Member Cities have outlined the need to maintain interconnection with adjacent cable systems for the purpose of sharing Twin Cities PEG programming both within the Needs Report and within the Model Ordinance. Comcast presents a far different approach to interconnection, which may or may not be maintained by Comcast over the term of the franchise and would not be an enforceable obligation by the Member Cities.

For all of the reasons set forth above, the Formal Proposal presented by Comcast to support PEG access programming is unacceptable.

<u>Exhibit C – Service to Public and Private Buildings</u>. The list of institutions included in the Model Ordinance includes continuing existing Comcast service to numerous locations that are not proposed to be served by Comcast within its Model Franchise. Comcast's failure to provide service to the locations listed within Exhibit C of the Model Ordinance is unacceptable.

<u>Exhibit D – List of Fiber Return Locations</u>. A detailed list of fiber return locations was included by the Commission and Member Cities to maintain the existing functionality offered by Comcast on its cable system. Comcast provides a substantially reduced list of fiber return locations. In fact the total number of fiber return locations was reduced by Comcast by over eighty percent (80%). For this reason, Comcast's proposal is unacceptable.

End of Exhibit

EXHIBIT B

Rules for the Conduct of an Administrative Hearing

Section 1. The Commission hereby establishes procedural guidelines for purpose of the administrative hearing under the Cable Communications Policy Act of 1984 as follows:

A. The Commission shall appoint an administrative law judge ("hearing officer") to conduct the administrative hearing and issue recommended findings of fact for consideration by the Commission. Comcast and the Commission will jointly determine the process for selecting an administrative law judge, if necessary. The administrative hearing will be conducted, to the extent practicable and consistent with the requirements of the Cable Communications Policy Act of 1984, pursuant to the provisions for administrative hearings in the Minnesota Administrative Procedures Act. The specific requirements for the administrative hearing shall be as follows:

B. Pre-hearing Discovery:

1. Each side is permitted limited requests for production of documents and twenty (20) interrogatories. With respect to interrogatories, the following rules apply:

a. Interrogatories are to be answered by any officer or agent of either party, who shall furnish such information as is available to the party;

b. Each interrogatory is to be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and answer to the extent that the interrogatory is not objectionable. All objections shall be stated with specificity and any ground for objection which is not stated in a timely manner is waived unless the party's failure is excused by the Commission for good cause shown; and

c. Interrogatories will be answered within the timeframe established by the hearing officer.

2. No depositions shall be permitted.

3. The hearing officer will rule on all discovery disputes which may arise.

4. Discovery shall close fifteen (15) days before the administrative hearing.

C. Pre-hearing Disclosures:

1. Each side shall disclose to the other the identity of any person who may be used at the hearing to present expert testimony prior to the hearing date. The disclosure must be accompanied by a written report prepared and signed by the expert which shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert informing his or her opinions; and any exhibits to be used as a summary or in support of the opinions so rendered; the qualifications of the witness; the compensation to be paid for the study and testimony of the expert; and a listing of other cases in which the expert has testified at trial within the preceding four (4) years.

2. Exhibits and witness lists will be mutually exchanged one (1) week prior to hearing date. Witness lists will briefly state the subject of the expected testimony of each witness.

D. Administrative Hearing:

(1) The hearing will be conducted on a date established by the hearing officer;

(2) Each side may be represented by an attorney and shall be afforded the opportunity to present relevant evidence and to call and examine witnesses and cross-examine witnesses of the other party;

(3) Commission members may not be called as witnesses nor may the Commission's or Comcast's legal counsel be called as witnesses;

(4) Witnesses will be sworn;

(5) The hearing shall be transcribed by a court reporter;

(6) The hearing officer will determine evidentiary objections. Strict compliance with the federal rules of evidence will not be necessary;

(7) Post-hearing briefs will be permitted in lieu of closing argument. Briefs will be mutually exchanged at a date established by the hearing officer; and

(8) The hearing officer will issue recommended findings of fact based upon the record of the proceeding and stating the reasons therefore, pursuant to the Cable Communications Policy Act of 1984, as amended.

E. The Commission will review the recommended findings of fact from the hearing officer and will, upon request of the parties, permit oral argument before the Commission not to exceed thirty (30) minutes per party. Thereafter the Commission will issue a written decision recommending to the Member Cities to grant or deny the proposal for renewal pursuant to the Cable Communications Policy Act of 1984, as amended.

Section 2. Neither the Commission's Needs Report dated April 4, 2018, nor Comcast's Formal Proposal dated August 15, 2018, have been amended or modified in any way since the dates submitted.

Section 3. The Commission finds that its actions are appropriate and reasonable in light of the mandates contained in federal law including 47 U.S.C. § 546.

End of Exhibit